

**Supreme Court, U.S.**  
**FILED**

**05 - 875 DEC 29 2005**

No. \_\_\_\_\_ **OFFICE OF THE CLERK**

---

**IN THE SUPREME COURT OF THE UNITED STATES**

---

**MARTIN ALLEN DRAUGHON**  
Respondent,

v.

**DOUG DRETKE**, Director, Texas Department of  
Criminal Justice, Correctional Institutional Division  
Petitioner.

---

On Petition For Writ of Certiorari  
to the Fifth Circuit Court of Appeals

---

**PETITION FOR WRIT OF CERTIORARI**

---

**GREG ABBOTT**  
Attorney General of Texas

**\*GENA BUNN**  
Assistant Attorney General  
Chief, Postconviction  
Litigation Division

**BARRY R. McBEE**  
First Assistant Attorney General

**TINA J. DETTMER**  
Assistant Attorney General  
Postconviction Litigation Division

**DON CLEMMER**  
Deputy Attorney General  
For Criminal Justice

P.O. Box 12548, Capitol Station  
Austin, Texas 78711  
(512) 936-1600

\* Counsel of Record

---

**ATTORNEYS FOR PETITIONER**

## **Capital Case**

### **QUESTION PRESENTED**

1. Whether the lower court engaged in hindsight analysis in direct conflict with the directive in *Strickland v. Washington*, 466 U.S. 688 (1984), when deciding Draughon's ineffective assistance of counsel claim on federal habeas review.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
PETITION FOR CERTIORARI .....	1
OPINION BELOW .....	1
JURISDICTION .....	1
FEDERAL CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	2
I. Facts of the Crime .....	2
II. Facts Relating to Sixth Amendment Claim .....	6
III. State and Federal Court Proceedings .....	10
SUMMARY OF THE ARGUMENT .....	11
I. The Court of Appeals' Decision Undermines the Authority of This Court Regarding the Application <i>Strickland's</i> Ineffectiveness of Counsel Standard. ....	11
A. This Court demands that judicial scrutiny of of counsel's conduct must be deferential and avoid hindsight analysis. ....	12

**TABLE OF CONTENT'S Continued**

<b>B. When viewed in light of this standard, counsel's conduct in this case does not offend the Constitution. ....</b>	<b>13</b>
<b>C. The Fifth Circuit's application of hindsight analysis undermines this Court's Sixth Amendment Jurisprudence. ....</b>	<b>16</b>
<b>II. The Lower Court Failed to Afford the Deference Required Under Federal Statute. ....</b>	<b>17</b>
<b>CONCLUSION .....</b>	<b>20</b>

## TABLE OF AUTHORITIES

<i>Strickland v. Washington</i> , 466 U.S. 688 (1984) . . . . .	<i>passim</i>
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) . . . . .	12
<i>(Terry) Williams v. Taylor</i> , 529 U.S. 362 (2000) . . . . .	18,19
<i>Woodford v. Visciotti</i> , 537 U.S. 19 (2002) . . . . .	18
<i>Yarborough v. Alvarado</i> , 124 S. Ct. 2140 (2004) . . . . .	19

### **Constitutions, Statutes, and Rules**

U.S. Const. amend VI . . . . .	<i>passim</i>
28 U.S.C. § 1254(1) . . . . .	1
28 U.S.C. § 2254(1) . . . . .	18
TEX. PENAL CODE § 6.03(a),(b) . . . . .	14
TEX. PENAL CODE §§ 19.02(b)(1) . . . . .	13
TEX. PENAL CODE §§ 19.03(a)(2) . . . . .	13
SUP. CT. R. 13.3 (West 2005) . . . . .	1

### **Miscellaneous**

Antiterrorism and Effective Death Penalty Act of 1996 . . . . .	17
---	----

## PETITION FOR CERTIORARI

The court of appeals below held that federal habeas relief was warranted on Respondent Martin Allen Draughon's<sup>1</sup> claim that he was deprived of constitutionally effective assistance from trial counsel in violation of the Sixth Amendment. The Fifth Circuit's decision directly conflicts with the jurisprudence of this Court and other courts of appeals on this issue. As a result, the Court should grant this petition to resolve the conflict and address the important, relevant questions of federal law.

## OPINION BELOW

The Fifth Circuit Court of Appeals affirmed the district court's decision conditionally granting federal habeas relief on September 30, 2005. *Draughon v. Dretke*, 427 F.3d 286 (5<sup>th</sup> Cir. 2005); *see also* Appendix A.

## JURISDICTION

The Fifth Circuit denied the Director's appeal on September 30, 2005. *Draughon, supra*. The Director did not file a motion for rehearing in this case. Thus, the Director's petition for writ of certiorari is timely filed on or before December 29, 2006. SUP. CT. R. 13.3 (West 2005). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

---

<sup>1</sup> Respondent will be referred to as "Draughon" and Petitioner will be referred to as "the Director."

## **FEDERAL CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED**

"In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

28 U.S.C. § 2254(d)(1).

## **STATEMENT OF THE CASE**

### **I. Facts of the Crime**

The panel opinion succinctly summarized the facts relating to the instant offense:

On November 22, 1986, Draughon attempted to rob a Long John Silver's restaurant in Houston, Texas. Hubbard Eugene Taylor, the assistant manager, closed the restaurant at approximately 11:00 p.m. As he finished closing up, Taylor saw two relatives

of his cashier gesturing to him through the window. Taylor and two employees went outside. A man wearing a stocking mask pointed a gun at them and said, "This is a stick up. Get back inside." The four complied. The robber told Taylor to "[g]et that alarm in the back. I know it's in the back." Taylor went to open the safe. The safe had a delay mechanism that required Taylor to wait ten minutes after entering the combination for a green light to come on, signifying that the safe could be opened. While Taylor waited, the robber approached him and asked, "[w]here is that green light?" While still waiting for the green light, Taylor heard some noise coming from the front of the restaurant. He later learned that the noise was caused by several people banging on the doors and windows. The robber then went to the back of the restaurant. Taylor heard the alarm go off and saw the robber leaving through the back door. Restaurant employee Susan Cuellar later identified Draughon as the robber.

Ricardo Guerrero lived near the restaurant. As he drove up to his apartment shortly before midnight on November 22, 1986, he saw Eva Cuellar running, crying and screaming for help. Guerrero followed Ms. Cuellar to the back of the restaurant. Attracted by her pleas for help, others also followed. Guerrero saw the back door of the restaurant open and a man run through it. The man ran into the parking lot and turned around. Guerrero heard a shot, threw himself to the ground, and heard several more shots. He also heard a truck. When Guerrero looked up, he saw the man jumping into the bed of a moving truck. Guerrero testified at trial that the man fired no



additional shots after jumping onto the truck. After the truck left, Guerrero stood up and saw his cousin, Armando Guerrero, lying on the ground with a bullet wound in his chest. Several of the men in the parking lot drove Armando to an emergency room, where he died.

Eva Cuellar, the mother of the restaurant cashier, was the key witness. She was standing near Armando when he was shot. She testified that she lived across the street from the Long John Silver's where her daughter Susan worked. With the late hour she became apprehensive about her daughter as the restaurant was preparing to close. Accompanied by her young son Eddie and armed with a knife, she walked to the restaurant and peered into the window. All appeared well at the time and she started back to the family home, leaving Eddie at the restaurant to accompany his sister home at closing. Not satisfied, she returned and this time saw that a man had drawn a stocking over his face and was holding a gun on the workers, including her daughter, Susan, and her son, Eddie. It was then that she fled down the street securing the help of some men who were having a beer in front of their homes. They returned to the restaurant and Armando suggested he and Ms. Cuellar go to the rear of the building and catch the robber if he fled out the back door. As they arrived at the rear Draughon suddenly burst through the door in a run. Ms. Cuellar testified that Draughon took about ten running steps after leaving the restaurant, and began shooting. She saw the "fire" from the pistol and Armando fall, holding his chest. According to her testimony, Draughon

fired three to six times before jumping into the back of a waiting truck which was pulling away. The pursuers were not armed except for the knife Ms. Cuellar had earlier procured. Thinking that Draughon had harmed her children, she chased the fleeing Draughon, throwing her knife at him in frustration and without effect.

Norene Smith, a nurse working in the emergency room when Armando was brought in, described the medical staff's unsuccessful efforts to resuscitate him. Smith explained that the bullet struck Guerrero's heart, leaving a great deal of blood in the chest cavity. Dr. Aurelio Espinola, a forensic pathologist, testified that the gunshot wound caused the death.

Following his arrest, Draughon was tried for capital murder. The parties agree that the following summary of evidence found by the federal district court is accurate:

Draughon testified on his own behalf during the punishment phase of trial .... Draughon explained the events that led to the shooting. Kenneth Gafford had formerly worked for the Long John Silver's and knew how the restaurant was set up and how the safe and alarm system worked. His information led to the planned robbery. Draughon testified that he saw a crowd forming outside the restaurant during the attempted robbery, became nervous, and ran out the back door toward the pickup truck where Gafford was waiting to drive away. The pickup was parked near the back of the restaurant. As Draughon

neared the truck, he turned and saw several people chasing him. Draughon testified that he dove into the back of the truck bed, leaned over the railing, and fired four shots. He testified that he aimed over the heads of the crowd and was only trying to scare people so they would stop chasing him. Draughon did not know that he shot Guerrero. Draughon offered no expert ballistics testimony in his defense. Charles Anderson, Firearms Examiner for the Houston Police Department, testified that nothing on the bullet recovered from Guerrero's body showed that it had hit an object and ricocheted before striking Guerrero.

*Draughon*, 427 F.3d at 289-292 (footnotes omitted).

## **II. Facts Relating to Sixth Amendment Claim**

The court of appeals also summarized the testimony offered by Draughon during the federal evidentiary hearing:

Lucian Haag, a certified criminalist, testified at the evidentiary hearing in this court.<sup>2</sup> Haag has particular training and expertise in firearms evidence and has published several papers on firearms evidence. Haag testified that Draughon's counsel asked him to try to determine whether the

---

<sup>2</sup> A criminalist is similar to a forensic examiner, but has broader training and experience. Haag explained, for example, that a forensic examiner might work in only one unit of a crime lab, whereas a criminalist will usually have worked in all sections of the crime lab.

fatal bullet could have hit a surface or object and ricocheted before striking Guerrero; to assess the distance from which the bullet was fired; to evaluate the quality of police investigation into Guerrero's death; and to opine on the work a ballistics expert could have done at the time of Draughon's trial. Haag testified that there were criminalists doing such work at the time of Draughon's trial.

Haag tested a Raven .25 pistol with a magazine and a single live round of ammunition and examined a fired bullet. Haag examined the rifling characteristics against those on the fired bullet, which was retrieved from Armando Guerrero's body. Haag noted damage to the fired bullet in the ogive area--the narrower part of the bullet that does not come into contact with the gun barrel. He observed heavy striations over the length of the bullet. Haag testified that the damage was caused by the bullet impacting a flat, unyielding, abrasive surface. Haag concluded that this damage occurred after the rifling marks were made, meaning that the striations occurred after the gun discharged the bullet. Haag concluded that this damage was a consequence of the bullet ricocheting off a hard, flat, unyielding surface, such as concrete or asphalt. Haag also concluded that the bullet had struck this hard, flat surface at a low angle, estimating it to be five degrees or less, and deflected or ricocheted off this surface before striking Guerrero. Haag opined that this damage would be obvious to any competent firearms examiner.

Haag also examined the bullet under a